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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975
NO. ____ 75-428

CHESTER McKINNEY,
Petitioner,

v.

JAMES C. PARSONS,
in his capacity as
Chief of Police of the
City of Birmingham, Alabama,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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CHESTER McKINNEY,
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Chief of Police of the
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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on May 23, 1975.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is set forth in Appendix A hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 23, 1975. An application for rehearing was timely filed and denied on June 20, 1975. This Court's jurisdiction is invoked under *Title 28 United States Code §1254(1).*

QUESTIONS PRESENTED

1. Are the provisions of the City of Birmingham Ordinance 67-2, on their face and as applied, violative of rights secured by the First, Fifth, and Fourteenth Amendments to the Constitution of the United States?

2. May a conviction under an unconstitutionally vague ordinance be saved from habeas corpus attack in federal court by an authoritative limiting construction which occurs *subsequent* to the conviction in question?

3. Are the materials involved herein not obscene as a matter of law and thus expression protected under the First and Fourteenth Amendments to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the *First, Fifth,* and *Fourteenth Amendments* to the *United States Constitution,* as well as the terms of the *City of Birmingham Ordinance 67-2* are set forth in Appendix B hereto.

STATEMENT

Petitioner was charged in the Circuit Court of Jefferson County, Alabama, with six counts of violating *Birmingham City Ordinance No. 67-2* relating to the distribution of obscenity. The six charges were consolidated and tried without a jury upon stipulated facts. On May 13, 1971, Petitioner was found guilty on all counts and sentenced to three years of incarceration and $1,800.00 in fines.

Timely notices of appeal were filed for each judgment of conviction and the cases were again consolidated for briefing and argument in the Alabama Court of Criminal Appeals. The consolidated appeal was dismissed, however, when Petitioner's brief was filed one day late. After the Supreme Court of Alabama denied certiorari in each case, the United States Supreme Court denied a Petition for a Writ of Certiorari to the Alabama Court of Criminal Appeals on the ground that "the judgment below rests upon an adequate state ground." *McKinney v. Birmingham,* 409 U.S. 895 (1972).

A Petition for Habeas Corpus was filed in the United States District Court for the Northern District of Alabama on November 15, 1972. The district judge, adopting and

accepting the finding of a magistrate that the materials involved are obscene, concluded that "no constitutional right of Petitioner has been abridged in connection with the convictions of Petitioner." Habeas corpus relief was therefore denied. The United States Court of Appeals for the Fifth Circuit vacated and remanded the case to the District Court directing the judge "to reach a decision from personal inspection of the materials and the record in state court." *McKinney v. Parsons*, 488 F.2d 452 (CA 5 1974).

Upon remand, the district judge reviewed the materials, found them obscene, and denied the Petition for Habeas Corpus. On appeal, the denial of habeas corpus relief was affirmed by the United States Court of Appeals in the judgment and opinion which are here sought to be reviewed.

REASONS FOR GRANTING THE WRIT

I.

THE PROVISIONS OF CITY OF BIRMINGHAM ORDINANCE 67-2 ARE, AS WRITTEN AND APPLIED HEREIN, REPUGNANT TO THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

On June 21, 1973, this Court announced its holdings in five cases which drastically changed the constitutional framework of all obscenity laws. *Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *United States v. Orito*, 413 U.S. 139 (1973); *Kaplan v. California*, 413 U.S. 115 (1973); *United States v. 12 - 200 Ft. Reels of Film*, 413 U.S. 123 (1973). The Birmingham Ordinance under which Petitioner was convicted is

unconstitutional for its failure to meet the strict specificity requirements set forth in those decisions. When judged by the standards enunciated therein, the Ordinance under which Petitioner was convicted must be found void for vagueness.

Mr. Chief Justice Burger, in *Miller v. California, supra,* conceding the failure of this Court to set forth precise constitutional standards, writes in part as follows:

> "Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power. See, e.g. Redrup v. New York, 386 U.S. 767, 770-771 (1967). We have seen 'a variety of views among the members of the Court unmatched in any other course of constitutional adjudication.' Interstate Circuit, Inc. v. Dallas, 390 U.S. at 704-705 (1968)" 413 U.S., at 22

After recognizing the failure of any constitutional definition of what is obscene to be accepted by a majority of this Court, the opinion goes on to state the singular unvarying factor which represents a consensus of prior decisions of the Court:

> "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment, Kois v. Wisconsin, 408 U.S. 229 (1972). United States v. Reidel, 402 U.S. 351, 354 (1972). Roth v. United States, 354 U.S. 476, 485 (1957). 'The First and Fourteenth Amendments have never been treated as absolute (footnote omitted).' Breard v. Alexandria, supra, 341 U.S. 622 at 642 (1951), and case cited. See Times Film Corp. v.

Chicago, 365 U.S. 43, 47-50 (1961); Joseph Burstyn, Inc. v. Wilson, supra, 343 U.S. at 502 (1952)." 413 U.S., at 23.

Thereupon the Court goes on to state a new constitutional standard for State cases:

> "We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See Interstate Circuit, Inc., vs. Dallas, supra, 390 U.S. at 682-685 (1968). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. *That conduct must be specifically defined by the applicable State law as written or authoritatively construed.* A State offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in the patently offensive way and which, taken as a whole, do not have serious literary, artistic, political or scientific value." 413 U.S., at 23-24, (emphasis supplied).

The opinion of Mr. Chief Justice Burger, speaking for the majority pointing to the prospective operation of the newly announced constitutional standards, after either future legislative enactment or authoritative judicial construction, stated:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating State law, as

> written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials this his public and commercial activities may bring prosecution. See Roth v. United States, supra, 354 U.S. at 491-492 (1957)." 413 U.S., at 27.

Miller v. California, supra, is the key case in which this Court defined the standards which now must be used to identify obscene material that a State or the federal government may regulate without infringing the First Amendment. It is obvious that the Court undertook to formulate standards more concrete than those that have ever been in the past. The sharpness of the break with *Roth* when the Court handed down *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) was not nearly so great as the break with *Memoirs* that occurred in *Miller v. California*. The Court was very careful to announce that statutes designed to regulate obscene materials must be carefully limited and the Court confined the permissible scope of obscenity regulation to works which depict or describe sexual conduct specifically defined by the applicable obscenity statute as written or as authoritatively construed.

The Court discussed the press materials to which the regulation would be confined, the press materials which would constitute the offense and the guide lines necessary to forewarn a potential wrongdoer. That element of the three-part test and the key guideline for the trier of fact in the new tripartite test clearly indicate the facial invalidity of the City Ordinance:

> "Whether the work depicts or describes, in a patently offensive way, sexual conduct that is specifically defined by the law . . .If the state law that regulates obscene material is thus limited as written and construed, the material may be regulated." 413 U.S., at 24-25.

Clearly, if the provisions of the City Ordinance are limited to press materials which depict or describe hard core sexual conduct, and if that sexual conduct is specifically defined in writing by the City, or if specific hard core sexual conduct has been read into the Ordinance by authoritative judicial construction, the present ordinance under attack is not sufficient to regulate those works depicting and describing that conduct.

The Court below, in answer to this contention, held:

> "The Birmingham ordinance has been authoritatively construed as limited to materials depicting or describing the type of hardcore sexual conduct described in *Miller*. McKinney v. City of Birmingham, 52 Ala. App. 605, 296 So.2d 197, 201 (Ct. Crim.App. 1973), cert. denied, 292 Ala. 716, 296 So.2d 202, cert. denied, _____U.S._____, 95 S.Ct. 1335, 43 L.Ed.2d 429 (1975)."

McKinney v. City of Birmingham, supra, (McKinney I) simply does not do this. Admittedly, the ordinance itself does not specifically define the sexual conduct it purports to proscribe. Nowhere in the *McKinney I* decision cited by the Court of Appeals does the Alabama Court construe the ordinance as being limited to materials depicting or describing the type of hard-core sexual conduct described in *Miller*. For

this reason, City of Birmingham Ordinance 67-2, at the time Petitioner was arrested, tried and convicted, was unconstitutional since it failed to comply, either as written or as authoritatively construed, with the constitutional standards set out in *Miller v. California*, supra.

The four page opinion in which the Alabama Court makes reference to the *Miller* decision does not in and of itself define the term "sexual conduct" with the specificity required by *Miller*, which states:

> "State statutes designed to regulate obscene materials must be carefully limited . . .As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. *That conduct must be specifically defined by the applicable state law, as written or authoritatively construed.*" 413 U.S., at 24 (emphasis added).

The Alabama Court says in its *McKinney I* opinion:

> "We have viewed the films in question and find that they fall squarely within the definition of legal obscenity as stated above in *Miller*, supra." 52 Ala. App., at 610.

This statement merely means that the court found the films to fall squarely within the definition of legal obscenity as stated in *Miller*. The definition of legal obscenity as stated in *Miller* is:

"(a) Whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest.

(b) Whether the work depicts or described in a patently offensive way, sexual conduct specifically defined by the applicable state law, and

(c) Whether the work, then as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S., at 24.

Within paragraph (b) of this definition is the requirement that the statute in question, as written or construed, *must* specifically define the sexual conduct proscribed by it. Finding the film to be within the definition of obscenity is not the same as defining the sexual conduct to be proscribed.

The Alabama Court also states:

"The *Miller* standards are now read into the ordinance in question." 52 Ala.App., at 611.

Again, reading the *Miller* standards (guidelines) into ordinance does not define the sexual conduct to be proscribed. It merely adopts the standards, one of which requires the applicable state law to define the sexual conduct to be proscribed.

Lastly, the Alabama Court states:

"We find that each exhibit 'falls squarely within the *Miller* definition of obscenity." 52 Ala.App., at 611.

The Alabama Court again has misinterpreted the import of the *Miller* requirement of specificity in the applicable state law. The contention that the exhibits "falls squarely within the *Miller* definition of obscenity" is not sufficient if the applicable state law does not specifically define the sexual conduct it purports to prohibit, and if the court has failed, as it has in *McKinney I,* to construe the ordinance as limited to material depicting or describing the type of hard-core sexual conduct described in *Miller.*

The only other Alabama Court opinion involving the Birmingham ordinance in question, and which cites *Miller,* is *Harlow, et al, v. Birmingham,* 52 Ala.App. 612, 296 So.2d 202 (1974). That court made two references to the *Miller* decision:

The first such reference in *Harlow* was:

"We stamp these publications with the label 'obscene material and hard-core pornography', which 'taken as a whole appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or sceintific value.' *Miller v. California"*

The Alabama Court states that the publication portrays sexual conduct in a patently offensive way. It does not include the *Miller* criteria which goes on to require the sexual conduct to be "specifically defined by the applicable state law". The decision does not specifically define the sexual conduct to be proscribed, and cannot therefore be interpreted as construing the type of sexual conduct *Miller* says must be specifically defined.

The second reference was:

> "We hold that the city ordinance under which these prosecutions arose is constitutional when measured by the test prescribed by *Miller v. California*, supra."

Here again, the Alabama Court makes a conclusory statement with regard to the constitutionality of the Birmingham ordinance. It measures that constitutionality with the test prescribed by *Miller* without defining the sexual conduct to be proscribed which is an essential element of that test. To merely adopt the *Miller* guidelines does not meet the specificity requirement.

The above quotes are all of the references in the Alabama cases cited above that could possibly be the basis for the Court of Appeals' assertion that the Birmingham ordinance has been authoritatively construed as limited to materials depicting or describing the type of hard-core sexual conduct described in *Miller*. These cases, again, simply do not do this. The Ordinance thus remains void for vagueness, lacking in the requisite authoritative construction.

II.

AN UNCONSTITUTIONALLY VAGUE ORDINANCE MAY NOT BE SAVED FROM HABEAS CORPUS ATTACK BY AN AUTHORITATIVE LIMITING CONSTRUCTION WHEN THE CONSTRUCTION OCCURS *SUBSEQUENT* TO THE CONVICTION ATTACKED.

Even assuming, *arguendo*, that Birmingham Ordinance 67-2 has been the subject of a constitutionally acceptable

authoritative construction pursuant to the mandates of *Miller*, such a construction cannot save the Ordinance as it applies to Petitioner's conviction if the construction occurred subsequent to the conviction. The Petitioner here was convicted on May 13, 1971. The Petition for Habeas Corpus was filed in the United States District Court the Northern District of Alabama on November 15, 1972. The Alabama Court of Appeals case to which the Court below referred in finding that the statute had been authoritatively construed was rendered on October 30, 1973, more than two years after Petitioner's conviction. The Court of Appeals below recognized this fact but held that a criminal statute which is void for vagueness is not subject to attack on habeas corpus once the statute has been authoritatively construed so as to render it constitutionally acceptable, even if the construction occurs subsequent to the conviction which is to be reviewed.

The Court of Appeals reached the above conclusion on the basis of its analysis of this Court's decision in *Hamling v. United States*, 418 U.S. 87 (1974), and of this Court's vacation and remand in *Divine v. Amato*, _____U.S._____, 95 S.Ct. 487, 42 L.Ed.2d 288 (1974). *Divine* was vacated and remanded by this Court for further consideration in light of *Hamling, supra.*

It is respectfully submitted that the Court below erred in its interpretation of this Court's decision in *Hamling v. United States*, 418 U.S. 87 (1974). *Hamling* did not hold, as was contended below, that a subsequent construction of an unconstitutionally vague statute could save a conviction which occurred prior to the construction. *Hamling* involved a construction of *Title 18 United States Code §1461*, a federal obscenity statute which Hamling contended was unconstitutionally vague as applied to him. In rejecting this

argument, this Court held that a sufficient construction had been placed upon the statute *prior to* the petitioner's conviction. As the Court stated:

> "The enumeration of specific categories of material in Miller which might be found obscene did not purport to make criminal for the purposes of 18 U.S.C. §1461, conduct which had not previously been thought criminal. That requirement instead added a 'clarifying gloss' to the *prior* construction and therefore made the meaning of the federal statute involved here 'more definite' in its application to federal obscenity prosecutions." 418 U.S., at 116 (emphasis added).

The Supreme Court pointed to its construction of the federal statute in *Roth v. United States*, 354 U.S. 476 (1957). In light of *Roth*, this Court held that *Hamling's* vagueness argument must be rejected because it "neglects this court's decisions prior to *Miller* regarding vagueness challenges to the federal statute." 418 U.S., at 111.

The position here urged by Petitioner found formulation in this Court in *Bouie v. City of Columbia*, 378 U.S. 347 (1964). In *Bouie* this Court reversed convictions for a crime which was "not enumerated in the statute" at the time of the alleged violating conduct. In so reversing the Court noted:

> "A deprivation of the right of fair warning can result not only from vague statutory language, but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." 378 U.S., at 352.

The Court in *Hamling* did not abandon the precepts of *Bouie*. Rather, as above set forth, it held that *Bouie* was inapplicable since the federal statute had been sufficiently construed *prior to* the conduct in question. Even assuming, *arguendo*, that a constitutionally permissible authoritative construction has been placed upon the Birmingham City Ordinance involved here, such a construction occurred subsequent to the conduct charged against Petitioner and thus cannot save the Ordinance as it applies to him. *Bouie v. City of Columbia, supra.*

III.

THE MATERIALS INVOLVED HEREIN ARE NOT OBSCENE IN THE CONSTITUTIONAL SENSE AS A MATTER OF LAW AND ARE THUS PROTECTED EXPRESSION UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The doctrine necessitating an independent appellate review of the alleged obscenity of materials found obscene at the trial level was enunciated by this Court in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). It was there held that the Court's duty "admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case'." *Id.*, at 188, quoting *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 488.

The continuing validity of this doctrine and of the appellate duty it imposes was affirmed by this Court only last year in *Jenkins v. Georgia*, 418 U.S. 153 (1974). *Jenkins* involved a reversal of a state obscenity conviction predicated upon an exhibition of the film "Carnal Knowledge." The

reversal was based upon this Court's own viewing of the film, and the finding that it was not, as a matter of constitutional law, obscene. *Id.* This Court is respectfully called upon to perform the judicial duty delineated above, and thus to determine the obscenity *vel non* of the materials alleged to be obscene in the within proceedings.

The materials involved herein should be judged in such an analysis by the status of the law being applied at the time of the complaint of conduct. Briefly, the law which was being applied at that time permitted a certain type of judicial review which has been characterized as the *Redrup* approach. *Redrup v. New York*, 386 U.S. 767 (1967). It was there suggested, in essence, that where there was no evidence of sales to minors under state statutes reflecting a specific and limited concern for juveniles, nor where there was any dissemination or attempt at dissemination in a manner calculated to intrude into the privacy of an unwilling individual who wanted to avoid confrontation with this kind of material, or where there was no evidence of the type of "pandering" which the Court had seen significant in *Ginzburg v. United States*, 383 U.S. 463 (1966), that no obscenity conviction or suppression could follow consistent with the *First Amendment*. Thereafter the Court reversed some thirty-three cases, representing a wide cross-section from both federal and state courts, involving both criminal and civil condemnations, citing only the authority of *Redrup v. New York, supra.*

The cases reversed were: *Austin v. Kentucky*, 386 U.S. 767 (1967); *Gent v. Arkansas*, 386 U.S. 767 (1967); *Ratner v. California*, 388 U.S. 422 (1967); *Cobert v. New York*, 388

U.S. 443 (1967); *Keney v. New York*, 388 U.S. 440 (1967); *Friedman v. New York*, 388 U.S. 441 (1967); *Aday v. United States*, 388 U.S. 447 (1967); *Avansino v. New York*, 388 U.S. 446 (1967); *Sheperd v. New York*, 388 U.S. 444 (1967); *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448 (1967); *Books, Inc. v. United States*, 388 U.S. 449 (1967); *Mazes v. Ohio*, 388 U.S. 453 (1971); *Schackman v. California*, 388 U.S. 454 (1967); *Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50 (1967); *Potomac News Co. v. United States*, 389 U.S. 47 (1967); *Conner v. City of Hammond*, 389 U.S. 48 (1967); *Chance v. California*, 389 U.S. 89 (1967); *I.M. Amusement Corporation v. Ohio*, 389 U.S. 573 (1968); *Robert-Arthur Management Corp. v. State of Tennessee*, 388 U.S. 578 (1968); *Felton v. City of Pensacola*, 390 U.S. 340 (1968); *Henry v. State of Louisiana*, 392 U.S. 655 (1968); *Carlos v. New York*, 396 U.S. 119 (1969); *Cain v. Kentucky*, 397 U.S. 319 (1970); *Bloss v. Deykema*, 398 U.S. 278 (1970); *Walker v. Ohio*, 398 U.S. 434 (1970); *Hoyt, et al. v. State of Minnesota*, 399 U.S. 524 (1970); *Childs v. Oregon*, 401 U.S. 1006 (1971); *Bloss v. Michigan*, 402 U.S. 938 (1971); *Burgin v. South Carolina*, 404 U.S. 806 (1971); *Wiener v. California*, 404 U.S. 988 (1971); *Hartstein v. Missouri*, 404 U.S. 988, 30 L.Ed.2d 539 (1971).

Findings of obscenity have been reversed as to press materials devoted entirely to explicitedly depicting or describing the sexual activities of its characters, including detailed and vernacular descriptions reaching the ultimate in explicitness, of heterosexual intercourse, masturbation, beastiality, oral-genital intercourse, sado-masochism, and homosexual activity; e.g., *Memoirs v. Massachusetts*, supra,

("Fanny Hill"); *Aday v. United States, supra* ("Sex Life of a Cop," see description of book at 357 F.2d 855); *Corinth Publications v. Wesberry*, supra, ("Sin Whisper," see description of book at 146 S.E. 2d 764); *Mazes v. Ohio*, supra, ("Orgy Club"); *Hoyt v. Minnesota*, supra, ("The Way of a Man With a Maid," "Lady Susan's Cruise Lover," and three other books); and *Grove Press v. Gerstein*, 378 U.S. 577 (1964) ("Tropic of Cancer").

With respect to motion picture films the Court has reversed findings of obscenity as to films which depict totally nude women, films which show nude and partially nude women and men engaged in sexual gyrations, simulated intercourse and simulated oral-genital intercourse, all emphasizing pubic and rectal areas, films showing lesbian sexual activity and heterosexual activity between men and women. Morever, this Court affirmed a reversal by the Ninth Circuit Court of Appeals of a finding of obscenity of a "stag film depicting a nude woman masturbating, with emphasis on the female genitalia and sexual gyrations." *Pinkus v. Pitchess*, 429 F.2d 416 (CA-9 1970), *aff'd* 400 U.S. 922 (1970), *sub. nom., Pinkus v. California.*

Thus, the only conclusion which could have been rationally extra-polated from these decisions is that any publication containing exclusively pictorial material which depicts, graphically and exclusively, nudes in sexual poses and movements, even without presence of social importance, is constitutionally protected. Should the pictures show graphic depiction of sexual acts accompanied by substantial test material, then requisite social value is present and thus, the material would not be obscene.

The press materials at bar when considered as a whole, and as judged against press materials of similar or more explicit content heretofore determined by this Court not to be obscene in the constitutional sense should thus be held protected.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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EXHIBIT "A"

Chester McKINNEY,
Petitioner-Appellant,

v.

James C. PARSONS, Chief of Police,
etc., Respondent-Appellee.

No. 74-2106.

United States Court of Appeals,
Fifth Circuit.

May 23, 1975.

A state prisoner who had been convicted of violating the Birmingham, Alabama, obscenity ordinance prior to the United States Supreme Court's Miller decision sought federal habeas corpus relief. After remand from a previous appeal, 488 F.2d 452, the United States District Court for the Northern District of Alabama, at Birmingham, Clarence W. Allgood, J., denied relief, and the prisoner appealed. The Court of Appeals, Gee, Circuit Judge, held that while a state defendant whose conviction was filed prior to the Miller series of decisions is entitled to the benefits of those decisions, if any, no relief from such a conviction is available where, as in the case at bar, the ordinance in question has been authoritatively construed as being limited to materials depicting or describing the type of hard-core sexual conduct condemned in Miller.

Affirmed.

1. Habeas Corpus – 45.2(4)

Neither Court of Appeals nor district court had habeas corpus jurisdiction to consider whether state prisoner's convictions under city obscenity ordinance violated rights secured to him by Constitution of State of Alabama. 28 U.S.C.A. § 2241; Const.Ala.1901, art. 1, § 4.

2. Courts – 100(1)

Federal defendant indicted, tried and convicted pre-Miller is, on direct appeal, entitled to all benefits of Miller definition of obscenity, but is free of its detriments. U.S.C.A.Const. Amend. 1.

3. Courts – 100(1)

Federal defendant indicted pre-Miller but prosecuted post-Miller must be tried under Roth-Memoirs definition of obscenity, at least insofar as it is more restrictive than Miller definition. U.S.C.A.Const. Amend. 1.

4. Obscenity – 5

In habeas corpus proceeding by prisoner convicted of violating Birmingham, Alabama obscenity ordinance, federal district court agreed with Alabama trial court that materials in question were well without broadest reading of protection afforded by Roth-Memoirs formulation of obscenity. U.S.C.A.Const. Amend. 1.

5. Courts – 100(1)

State defendant whose conviction was final prior to decisions of United States Supreme Court in Miller series of cases is entitled to benefits of those decisions, if any.

6. Courts – 100(1)

"Defense" of undue vagueness of criminal statute is not available once statute under consideration has been authoritatively construed so as to render it constitutionally acceptable, even if construction occurred after original conviction.

7. Habeas Corpus – 32

Where state statute, said to be unconstitutionally vague, is authoritatively construed so as to render it constitutionally acceptable, conviction may not be attacked by petition for habeas corpus in federal court, even though such authoritative construction occurred subsequent to conviction. U.S.C.A.Const. Amend. 1.

8. Courts – 100(1)

Subsequent construction of seemingly indefinite statute adequately allows appellate court to determine whether particular conviction was arbitrary or discriminatory.

9. Criminal Law – 13.1(1)

When vagueness attack centers on want of fair notice, person convicted must, to prevail, demonstrate that statute as written or construed at time of his conviction would fail to alert average man that what he was convicted of was proscribed.

10. Habeas Corpus – 32
Municipal Corporations – 598

Where, after pre-Miller convictions under city obscenity ordinance, ordinance was authoritatively construed as being limited to materials depicting or describing type of hard-core sexual conduct condemned in Miller, and where allegedly

obscene materials on which conviction was based were clearly prohibited by ordinance as thus construed, ordinance as construed was constitutional and no habeas corpus relief from conviction would be afforded. U.S.C.A.Const. Amends. 1, 5, 14; 18 U.S.C.A. § 1461.

Appeal from the United States District Court for the Northern District of Alabama.

Before BELL, THORNBERRY and GEE, Circuit Judges.

GEE, Circuit Judge:

In May of 1971, Chester McKinney was convicted by the Circuit Court of Jefferson County, Alabama, of six violations of the obscenity ordinance of the City of Birmingham.[1] He

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1. ORDINANCE NO. 67-2

AN ORDINANCE TO MAKE UNLAWFUL THE POSSESSION, PUBLISHING, PRINTING, MANUFACTURING, SALE, DISTRIBUTION, ADVERTISEMENT OR EXHIBITING OF OBSCENE MATTER IN THE CITY OF BIRMINGHAM OR THE POLICE JURISDICTION THEREOF AND PRESCRIBE PENALTIES THEREFOR BE IT ORDINAINED by the Council of the City of Birmingham as follows:

Section 1. The following words and terms, when used in this Ordinance, shall for the purpose of this ordinance have the meanings respectively ascribed to them by this section:

A. "Obscene" means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i. e., a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the

appeals the Northern District of Alabama's second[2] denial of habeas corpus relief. Since we find no constitutional infirmity in his convictions, we affirm.

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circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, predominant appeal shall be judged with reference to such audience. If the subject matter is distributed to minors under 18 years of age, predominant appeal shall be judged with reference to an average person of the actual age of the minor to whom such matter is distributed.

B. "Matter" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription, or mechanical, chemical or electrical reproduction, or any other articles, equipment, machines or materials.

C. "Person" means any individual, partnership, firm, association, corporation or other legal entity.

D. "Distribute" means to transfer possession of, whether with or without consideration.

E. "Knowingly" means having actual or constructive knowledge of the character and content of the subject matter. A person has constructive knowledge if a reasonable inspection under the circumstances would disclose the nature of the subject matter and the failure to inspect it for the purpose of avoiding such disclosure.

F. "City" means City of Birmingham, Alabama.

Section 2. It shall be unlawful for any person to knowingly send or cause to be sent or bring or cause to be brought into this City or the police jurisdiction thereof, for the sale or distribution, any obscene matter.

Section 3. It shall be unlawful for any person to knowingly publish, print, exhibit, distribute or have in his possession with intent to distribute, exhibit, sell or offer for sale, in the City of the police jurisdiction thereof, any obscene matter.

This ordinance is no longer in effect, having been replaced by City of Birmingham Ordinance No. 73-93.

2. *See* McKinney v. Parson,s 488 F.2d 452 (5th Cir. 1974).

Upon first filing his habeas corpus petition McKinney advanced three grounds upon which the writ should issue. It was his contention (1) that the four magazines and two films involved in the case are not, as a matter of constitutional law, obscene but rather are protected by the First and Fourteenth Amendments, (2) that the trial court denied him due process of law by convicting him without having received any expert testimony on the question of whether the magazines and movies were obscene[3] and (3) that the trial court violated his First, Fifth and Fourteeth Amendment rights by applying a local community standard rather than a national community standard in determining the obscenity vel non of the materials. McKinney now complains, in addition, (4) that the ordinance under which he was convicted is incurably void for vagueness, (5) that it is repugnant to Article 1, § 4 of the Constitution of the State of Alabama, and, also, (6) that the district court, upon reconsideration following remand, failed to follow the instructions of this court.

[1] We deal but briefly with four of these six contentions. The want-of-expert-testimony argument is answered by Paris Adult Theatre I. v. Slaton, 413 U.S. 49, 56, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973) and Kaplan v. California, 413 U.S. 115, 121, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973).[4] The local-versus-national community standards question has been resolved against McKinney by Jenkins v. Georgia, 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974), and by Miller v. California, 413 U.S. 15, 93 S.Ct.

3. Trial was to the court. Evidence concerning the nonpandering nature of distribution was stipulated. Virtually the only evidence received was the materials themselves.

4. We see no distinction, helpful to McKinney, in regard to the need for expert testimony, between a case tried to a jury and one tried to the court.

2607, 37 L.Ed.2d 419 (1973). As federal courts, neither we nor the district court has habeas corpus jurisdiction to consider whether McKinney's convictions violated rights secured to him by the Constitution of the State of Alabama.[5] 28 U.S.C. § 2241. Finally, the district court correctly interpreted and followed our remand instructions.

[2, 3] Only rarely does a state conviction for distributing or exhibiting obscene material arrive for review, via habeas corpus proceedings, on the doorstep of a United States Court of Appeals. So far as we know, this is only the second post-*Miller* instance of such an occurrence,[6] and the first in our circuit. Not only is this our first post-*Miller* habeas/obscenity case, it is also the first time we have been called upon to review, post-*Miller*, a conviction which was final pre-*Miller*. We have held that a federal defendant indicted, tried and convicted pre-*Miller* is, on direct appeal, entitled to all of the benefits of the *Miller* definition of obscenity but is free of its detriments. United States v. Thevis, 484 F.2d 1149, 1155, fn. 7 (5th Cir. 1973), cert. denied, 418 U.S. 932, 94 S.Ct. 3222, 41 L.Ed.2d 1170 (1974), *explained in* United States v. Wasserman, 504 F.2d 1012, 1014, (5th Cir. 1975). The Supreme Court has similarly ruled that state court defendants whose convictions were on direct appeal at the time that the *Miller* series was handed down are due any benefits of those decisions. Jenkins v. Georgia, *supra*. Moreover, we have concluded that a federal defendant indicted pre-*Miller* but prosecuted post-*Miller* must be tried under the *Roth-Memoirs*,[7] definition of obscenity, at

5. We doubt seriously, however, that they did. *See* McKinney v. City of Birmingham, 292 Ala. 726, 296 So.2d 236 (1974).

6. The first was Amato v. Divine, 496 F.2d 441 (7th Cir.), vacated, ____ U.S. ____, 95 S.Ct. 487, 42 L.Ed.2d 288 (1974), concerning which, more later.

7. Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957); Memoirs v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966).

least insofar as it is more restrictive than the *Miller* definition. United States v. Wasserman, *supra*. None of these cases decides what substantive definition of obscenity should apply when a state-court defendant attacks a final, pre-*Miller* conviction via federal habeas corpus, the more restrictive *Roth-Memoirs* definition or the current *Miller* definition.

[4] This case does not require us to decide whether the *Miller* series' interpretation of what is obscene and thus without the protection of the First and Fourteenth Amendments may, in its more expansive aspects, be applied retroactively to uphold a final, pre-*Miller* state conviction which might be judged valid under that test (as well as the given state's statute), but invalid under *Roth-Memoirs*. Here, in convicting McKinney, the state trial court viewed the magazines and films involved and found each obscene within the words of the Birmingham ordinance and that the dominant theme of each

> . . . appeals to the prurient interest of the average person within the meaning of the U.S. Supreme Court test when taken as a whole, applying contemporary community standards, and is patently offensive to community standards in that . . . [each] goes beyond the customary limits of candor and explicitness in its representation of sexual matters, and is utterly without any redeeming social value or importance, ...

Both we and the district court, as required, have viewed the materials to test whether, in our independent judgment, they are constitutionally protected. Jacobellis v. Ohio, 378 U.S. 184, 190, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964); United States v. Thevis, *supra*, 484 F.2d at 1155; *cf.*, Jenkins v. Georgia, *supra*. And both we and the district court agree with the Alabama trial court that these wretched and pathetic materials are well without the broadest reading of the protection afforded by the *Roth-Memoirs* formulation of obscenity. That is, (a) the dominant themes of the materials

taken as a whole appeal to the prurient interests in sex, (b) the materials are patently offensive because they affront the contemporary standards relating to the description or representation of sexual matters of any and all American communities and (c) they are utterly without redeeming social value.[8]

[5] There remains only the problem of whether a state defendant whose conviction was final prior to the *Miller* series is entitled to the benefits of those decisions, if any. We conclude, in the spirit of Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), *Jenkins*, *Thevis* and *Wasserman*, that he is. This does not mean, however, as he strenuously maintains, that McKinney's conviction was illegal as based upon a statute void for vagueness. McKinney asserts *Miller* promises that no conviction can be sustained unless based upon a statute which, prior to conviction, whether as written or construed, proscribes *only* works depicting or describing, in a patently offensive way, sexual conduct which has been specifically defined. *Miller*, *supra*, 413 U.S. at 24, 27, 93 S.Ct. 2607. He points out that the Birmingham ordinance had never been authoritatively construed before his conviction and is not, on its face, limited to specifically-defined sexual conduct. He concludes from this that *Miller's* promise has been breached, that he was convicted under a vague statute, and that his conviction, therefore, must be overturned. This analysis, however, reflects the hope of McKinney and not the promise of *Miller*

In deciding Amato v. Divine, 496 F.2d 441 (7th Cir.), vacated, ____ U.S. ____, 95 S.Ct. 487, 42 L.Ed.2d 288

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8. McKinney contends that this definition of obscenity has been rejected by the Supreme Court and thus, although stricter than the current standard, may not now be utilized to test the constitutional validity of his conviction. We have considered this argument previously and have rejected it. United States v. Groner, 494 F.2d 499 (5th Cir. 1974), United States v. Thevis, *supra*.

(1974), the Seventh Circuit adopted almost exactly the line of reasoning advanced by McKinney on the vagueness issue. Its decision, however, was vacated by the Supreme Court, and the case was remanded for reconsideration in light of Hamling v. United States, *supra*, and the decision of the Supreme Court of Wisconsin in State ex rel. Chobot v. Circuit Court, 61 Wis.2d 354, 212 N.W.2d 690 (1973). *Chobot* is a case which, long after Amato's conviction for selling obscene material in violation of Wisc.Stat. § 944.21(1)(a), construes the words "lewd, obscene, or indecent," which are undefined in the statute, as restricted to sexual conduct "defined to be acts of sexual intercourse between humans, normal or perverted, actual or simulated, acts of masterbation, fellatio, cunnilingus, and acts of excretory function, lewd exhibition of the genitals especially in a stimulated condition and sexual relations between humans and animals." *Chobot, supra*, 61 Wis.2d at 370, 212 N.W.d2d at 698.[9]

Hamling, in an extended discussion of *Miller* and the relationship of that decision to the issue of the vagueness of a given obscenity statute, points out that

> At no point does *Miller* or any of the other obscenity decisions decided last term intimate that the constitutionality of pre-*Miller* convictions under statutes such as 18 U.S.C. § 1461 was to be cast in doubt. Indeed, the contrary is readily apparent from the opinions in those cases. We made clear in *Miller* 413 U.S., at 24, n. 6, 93 S.Ct. [2607], at 2615 [37 L.Ed.2d 419], that our decision was not intended to hold all state statutes inadequate, and we clearly recognized that existing statutes "as construed heretofore or hereafter, may well

9. *See* Detco, Inc. v. McCann, 380 F.Supp. 1366 (E.D.Wis. 1974), in which a three-judge district court held that Wisc.Stat. § 944.21 as construed prior to Court v. State, 63 Wis.2d 570, 217 N.W.2d 676 (1974), a case which followed *Chobot*, was unconstitutional and enjoined prosecution under that statute for conduct occurring prior to the date of the later decision.

> be adequate." That recognition is emphasized in our opinion in United States v. 12 200-ft. Reels of Film, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973).

Hamling, 418 U.S. at 112, 94 S.Ct. at 2905. 41 L.Ed.2d at 617-18, and that

> *Miller*, in describing the type of material which might be constitutionally proscribed, 413 U.S., at 25, 93 S.Ct. [2607], at 2615 [37 L.Ed.2d 419], was speaking in terms of substantive constitutional law of the First and Fourteenth Amendments. See Jenkins v. Georgia, 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed.2d 642. While the particular descriptions there contained were not intended to be exhaustive, they clearly indicate that there is a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is "patently offensive" within the meaning of the obscenity test set forth in the *Miller* cases. And, while the Court in *Miller* did refer to "specific prerequisites" which "will provide fair notice to a dealer in such materials," 413 U.S., at 27, 93 S.Ct. [2607], at 2616 [37 L.Ed.2d 419], the Court immediately thereafter quoted the language of the Court in Roth v. United States, 354 U.S., at 491-492, 77 S.Ct. [1304], at 1312-1313 [1 L.Ed.2d 1498], concluding with these words: "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . ." 413 U.S., at 28 n. 10, 93 S.Ct. [2607], at 2617 [37 L.Ed.2d 419].

Hamling, 418 U.S. at 114, 94 S.Ct. at 2906, 41 L.Ed.2d at 619. Moreover, in *Hamling*, the Court states that the seeming dictate of *Miller* that statutory proscriptions of obscenity be made explicit, either by their own language or by judicial construction, was an adjuration, an earnest or solemn urging or advising, and not a constitutional command. *Hamling*, 418

U.S., at 114, 94 S.Ct. at 2906, 41 L.Ed.2d at 619. The Court construed 18 U.S.C. § 1461, a statute which prohibits the use of the mails for transmitting, etc. "every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance" as "limited to the sort of 'patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in Miller v. California' ", *Hamling*, 418 U.S. at 114, 94 S.Ct. at 2906, 41 L.Ed.2d at 618, just as it had previously so construed 18 U.S.C. § 1462 in United States v. 12 200-ft. Reels of Film, 413 U.S. 123, 130 n. 7, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973). It then held that "as so construed, we do not believe that petitioners' attack on the statute as unconstitutionally vague can be sustained." *Hamling*, 418 U.S. at 114, 94 S.Ct. at 2906, 41 L.Ed.2d at 619. The Court continued:

> It is plain from the Court of Appeals' description of the brochure involved here that it is a form of hard-core pornography well within the types of permissibly proscribed depictions described in *Miller*, and which we now hold § 1461 to cover. Whatever complaint the distributor of material which presented a more difficult question of obscenity *vel non* might have as to the lack of a previous limiting construction of 18 U.S.C. § 1461, these petitioners have none.

The convictions of all petitioners were affirmed.

[6-9] Several lessons about the vagueness of obscenity statutes are to be drawn from *Hamling* and from the vacating of Amato v. Divine, *supra*. Traditionally, statutes purporting to restrict conduct colorably within protection of the First Amendment have been found vague for any of three reasons. These are that the law, because of its indefiniteness, (1) either fails to give fair notice to those persons potentially subject to it, or (2) fails to guard adequately against arbitrary and discriminatory enforcement, or (3) fails to provide sufficient "breathing space" for First Amendment rights. *See* W. LaFave

and A. Scott, Handbook on Criminal Law, § 12 (1972). It has been the rule that one attacking his conviction on the ground that the statute under which he was convicted was overbroad or vague and thus failed to provide sufficient breathing room for First Amendment rights, need not show that his individual conduct could not have been regulated by a properly drawn statute, Thornhill v. Alabama, 310 U.S. 88, 97, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). *Hamling* now teaches that such a "defense" to conviction or the affirmance of conviction is not available once the statute under consideration has been authoritatively construed so as to render it constitutionally acceptable, even if the construction occurred after the original conviction. The vacating of *Amato* indicates that this principle is applicable to habeas corpus attacks on state statutes authoritatively construed subsequent to conviction. Another lesson of *Hamling* is that subsequent construction of a seemingly indefinite statute adequately allows an appellate court to determine whether a particular conviction was arbitrary or discriminatory. Finally, *Hamling* re-emphasizes the general principle that, when the vagueness attack centers on want of fair notice, the person convicted must, to prevail, demonstrate that the statute as written or construed at the time of his conviction would fail to alert the average man that what he was convicted of was proscribed. Applying these principles to the case at bar, we affirm the district court's denial of McKinney's request for habeas corpus relief.

[10] The Birmingham ordinance has been authoritatively construed as limited to materials depicting or describing the type of hard-core sexual conduct described in *Miller*. McKinney v. City of Birmingham, 52 Ala.App. 605, 296 So.2d 197, 201 (Ct.Crim.App. 1973), cert. denied, 292 Ala. 726, 296 So.2d 202, cert. denied, ____ U.S. ____, 95 S.Ct. 1335, 43 L.Ed.2d 429 (1975). As so construed, it is constitutional, leaves adequate breathing space for First Amendment rights, and adequately advises juries and courts, both *nisi prius* and appellate, of the type of conduct which it

regulates. Neither McKinney nor any other soul has or could demonstrate that the statute as written might fail to notify the average man that the revolting and often pitiful magazines and films involved in this case were prohibited by it.

Affirmed.

Adm. Office, U.S. Courts –
West Publishing Company,
Saint Paul, Minn.

EXHIBIT "B"

UNITED STATES CONSTITUTION

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibitng the free exercise thereof; or abriding the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment

No person shall be held to answer to a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CITY OF BIRMINGHAM ORDINANCE 67-2

AN ORDINANCE TO MAKE UNLAWFUL THE POSSESSION, PUBLISHING, PRINTING, MANUFACTURING, SALE, DISTRIBUTION, ADVERTISEMENT OR EXHIBITING OF OBSCENE MATTER IN THE CITY OF BIRMINGHAM OR THE POLICE JURISDICTION THEREOF AND PRESCRIBE PENALTIES THEREFOR.

BE IT ORDAINED by the Council of the City of Birmingham as follows:

Section 1. The following words and terms, when used in this ordinance, shall for the purpose of this ordinance have the meanings respectively ascribed to them by this section:

A. "Obscene" means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, predominant appeal shall be judged with reference to such audience. If the subject matter is distributed to minors under 18 years of age, predominant appeal shall be judged with reference to an average person of the actual age of the minor to whom such matter is distributed.

B. "Matter" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription, or mechanical, chemical or electrical reproduction, or any other articles, equipment, machines or materials.

C. "Person" means any individual, partnership, firm, association, corporation or other legal entity.

D. "Distribute" means to transfer possession of, whether with or without consideration.

E. "Knowingly" means having actual or constructive knowledge of the character and content of the subject matter. A person has constructive knowledge if a reasonable inspection under the circumstances would disclose the nature of the subject matter and the failure to inspect it for the purpose of avoiding such disclosure.

F. "City" means City of Birmingham, Alabama.

Section 2. It shall be unlawful for any person to knowingly send or cause to be sent or bring or cause to be brought into this City or the police jurisdiction thereof, for sale or distribution, any obscene matter.

Section 3. It shall be unlawful for any person to knowingly publish, print, exhibit, distribute or have in his possession with intent to distribute, exhibit, sell or offer for sale, in the City or the police jurisdiction thereof, any obscene matter.

Section 4. It shall be unlawful for any person to knowingly have in his possession, custody or control, in the City or the police jurisdiction thereof, any obscene matter.

Section 5. It shall be unlawful for any person, with knowledge that a person is a minor under eighteen years of age, or who, while in possession of such facts that he should reasonably know that such person is a minor under eighteen years of age, to knowingly send or cause to be sent, exhibited, distributed, sold or offer for sale, any obscene matter to any such minor under eighteen years of age in the City of the police jurisdiction thereof.

Section 6. It shall be unlawful for any person, with knowledge that a person is a minor under eighteen years of age, or who, while in possession of such facts that he should reasonably know that such person is a minor under eighteen years of age, to hire, employ, or use such minor to do or assist in the doing of any act described in Sections 2, 3, 4, or 5 of this ordinance.

Section 7. It shall be unlawful for any person to write or create advertising for, or otherwise promote the sale or distribution of matter represented or held out by him to be obscene.

Section 8. It shall be unlawful for any person to knowingly, as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, publication or other merchandise, to require that the purchaser or consignee receive any matter reasonably believed by such purchaser or consignee to be obscene, or to deny or threaten to deny a franchise, or to revoke or threaten to revoke, or to impose any penalty, financial or otherwise, by reason of the failure of any such person to accept such matter, or by reason of the return of such matter.

Section 9. The possession of exhibition forbidden by this section shall not apply to a possession or exhibiton by a police officer, sheriff, deputy sheriff or other peace officer, or any person under their supervision and control, or any judge, jury or attache of a court, or any attorney, or any member of a legislative body, municipal, state or federal, when such possession or exhibition thereof is connected with the prosecution or investigation of a violation of possible violation of this ordinance or other law or the consideration of legislation or proposed legislation designed to eliminate or reduce obscenity in any form nor to any possession or exhibition by any person where such possession or exhibition is for a bona fide scientific or educational purpose.

Section 10. Any person who shall violate any provisions of this ordinance or who shall do any act made unlawful by this ordinance shall, upon conviction, be punished within the limits of and as provided in Section 1-6 of the General Code of the City of Birmingham, Alabama, 1964.

Section 11. It is hereby declared to be the intention of the Council of the City of Birmingham that the sections, paragraphs, sentences, clauses and phrases of this ordinance are severable and if any paragraph, clause, sentence, phrase or section of this ordinance shall be declared unconstitutional or otherwise invalid by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality or invalidity shall not affect any of the remaining paragraphs, clauses, sentences, phrases or sections of this ordinance since the same would have been enacted by the Council of the City of Birmingham without the incorporation in this ordinance of any such unconstitutional or invalid paragraph, clause, sentence, phrase or section.

Supreme Court, U. S.
FILED
OCT 18 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-428

CHESTER McKINNEY,
Petitioner,

vs.

JAMES C. PARSONS, in His Capacity as Chief of Police
of the City of Birmingham, Alabama,
Respondent.

BRIEF

In Opposition to a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-428

CHESTER McKINNEY,
Petitioner,

vs.

JAMES C. PARSONS, in His Capacity as Chief of Police
of the City of Birmingham, Alabama,
Respondent.

BRIEF

In Opposition to a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REASONS FOR DENYING THE WRIT

I

There Are No Special or Important Reasons for Granting Certiorari.

The petition for a writ of certiorari filed in this case fails to set out any special or important reasons for granting such. In fact, the opinion as quoted therein as "Exhibit A", pages A-1 through A-14 (513 F.2d 264) on its face is in complete accord

with the decisions of this court prior to and subsequent to *Miller v. California*, 413 U.S. 15 (1973) and companion cases. In any event, the petitioner was given the benefit of any doubt as to which test to apply since the Fifth Circuit Opinion clearly states that this issue was resolved in favor of petitioner in affirming the denial of relief by the District Court and the court cites and points to *Hamling v. U.S.*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 59, *Jenkins v. Georgia*, 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974), and its own opinions in *U.S. v. Thevis*, 484 F.2d 1149 (1973) and *U.S. v. Wasserman*, 504 F.2d 1012 (1975). Therefore, the petitioner attempts merely to obtain a review of this decision by advancing the same argument that the ordinance under which he was convicted was unconstitutional as written and applied.

II

The Ordinance Is Constitutional as Authoritatively Construed.

The Birmingham Ordinance No. 67-2 is alleged to be unconstitutional as written and applied when the convictions here occurred and his argument ignores that under the dictates of *Miller* as followed by the Fifth Circuit in this case the ordinance as authoritatively construed by the Alabama Appellate Courts, must be followed by the federal courts. *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 S.Ct. 211, — L.Ed. 2d —; *U.S. v. 37 Photographs*, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed. 2d 822, Reh. den. 403 U.S. 924, 91 S.Ct. 2221, 29 L.Ed.2d 702.

The petitioner argues that the *Miller* series of cases require strict specificity in describing proscribed sexual conduct and that the ordinance prior to and after its authoritative construction in *McKinney v. City of Birmingham*, 52 Ala. App. 605, 296 So. 2d 197, Cert. den. 292 Ala. 726, 296 So.2d 202, Cert. den. — U.S. —, 95 S.Ct. 1335, 43 L.Ed.2d 429 (1975), and *Harlow, et al v. Birmingham*, 52 Ala. App. 612, 296 So. 2d 202, Cert.

den. 292 Ala. 722, 296 So. 2d 206, Cert. den. U.S. —, 95 S.Ct. 1335, 43 L.Ed.2d 429 (1975) remains unconstitutional in that it still lacks specificity.

This contention is contrary to various decisions of other appellate courts which have authoritatively construed ordinances and statutes in accordance with the *Miller* series of cases. In other words, many cases decided since *Miller* involved pending direct appeals of pre-*Miller* convictions based on *Roth-Memoirs* principles in which cases the courts construed the law involved to meet the standards of *Miller*. Most of those cases this court vacated and remanded in the light of *Miller* have been since reaffirmed by the state or federal court from which they came, and this court has either denied certiorari or dismissed direct appeals of these reaffirmances. See *Price v. Comm. of Va.*, — U.S. —, 95 S.Ct. 186; *Cangiano v. U.S.*, — U.S. —, 95 S.Ct. 188; *Winslow v. Comm. of Va.*, — U.S. —, 95 S.Ct. 189; *Sulaiman et al. v. U.S.*, — U.S. —, 95 S.Ct. 192; *Blank v. California*, — U.S. —, 95 S.Ct. 193; *Kaplan v. California*, — U.S. —, 95 S.Ct. 194, *Tobolina v. California*, — U.S. —, 95 S.Ct. 201; *Goldstein v. Com. of Va.*, — U.S. —, 95 S.Ct. 202; *Bryant v. N.C.*, — U.S. —, 95 S.Ct. 238; *Harding, etc. v. U.S.*, — U.S. —, 95 S.Ct. 1437; *Dyke v. Georgia*, — U.S. —, 95 S.Ct. 1687. See also *Carlson, et al. v. U.S.*, — U.S. —, 94 S.Ct. 3213; *Sians v. U.S.*, — U.S. —, 94 S.Ct. 3215; *Brown, etc. v. U.S.*, — U.S. —, 94 S.Ct. 3215; *Cote v. U.S.*, — U.S. —, 94 S.Ct. 3217; *J-R Distributors, Inc., et al. v. State of Washington*, — U.S. —, 94 S.Ct. 3217; *Village Books, Inc., et al. v. Marshall*, — U.S. —, 94 S.Ct. 3220; *Thevis & Peachtree News, Inc. v. U.S.*, — U.S. —, 94 S.Ct. 3222; *Cangiano et al. v. U.S.*, — U.S. —, 94 S.Ct. 3223; *Enskat v. California*, — U.S. —, 94 S.Ct. 3225; *Paris Adult Theatre I, et al. v. Slaton*, — U.S. —, 94 S.Ct. 3227; *Kaplan v. U.S.*, — U.S. —, 94 S.Ct. 3229. Also, see State Court cases of: *Nebraska v. Little Art Corp.*, 215 N.W.2d 853; *Keating v. Vixen*, 301 N.E. 2d 880; *Rhodes v. State*, 283 So. 2d 351; *Stroud v. State*, 300 N.E. 2d 100; *Miller v. Robert*

Emmett Gardrich Corp., etc., 218 N.W. 2d 771; *Richards v. State*, 497 S.W. 2d 770; *City of Tacoma v. Lewis*, 513 P. 2d 85; *State ex rel. Sensenbrenner v. Bookstore*, 301 N.E. 2d 695.

The state statute involved in *Jenkins v. Georgia*, 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed. 2d 642 (1974), was similar to the ordinance here involved and lacked specificity until the Georgia Courts authoritatively construed it to meet *Miller* standards. This court granted certiorari there and did not disturb that construction. The case was reversed on the ground that the film made the basis of that action was simply not obscene as a matter of law.

It follows then that the ordinance here was not impermissibly construed and the definition of obscenity was limited effectively to those examples given in *Miller*. Such action does not violate adequate notice requirements. *Hamling v. U. S.*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590. Of course, this authoritative construction applies only to any convictions prior to *Miller* because after the *Miller* decision the ordinance was amended so as to contain a definition of specific sexual conduct deemed to be obscene. The construction is adequate for the purpose of complying with *Miller* in so far as the instant case is concerned.

The Federal Question Here Involved Has Been Determined by This Court.

The Alabama cases cited in the Fifth Circuit's decision and supra arose subsequent to those here in question, but the affirmances were subsequent to *Miller*. This Court has already denied certiorari in both those cases (cited supra) in which the Petitions for a Writ of Certiorari had adequately set out the same issues as are sought to be again reviewed in this petition. The difference is that these present cases were not on direct appeal, but involved final convictions being collaterally attached via a

Habeas Corpus proceeding. In *Hamling*, supra, it appeared that this court was saying that a final conviction prior to *Miller* would not be reviewed in the light of *Miller*, but judged on the law as it was at the time of conviction. However, the subsequent vacating and remanding of *Amato v. Devine*, 496 F.2d 441, Vacated 419 U.S. 1014, 95 S.Ct. 487, 42 L.Ed.2d 288, a final conviction pre-*Miller*, case in the light of *Hamling*, supra, and *State ex rel. Chabot v. Circuit Court*, 61 Wis. 2d 354, 212 N.W. 2d 690 (1973), settled that point. The Circuit Court accordingly has given the petitioner here any benefits that the *Miller* series of cases may have created. In any event, all of the federal questions raised in the petition have been previously determined against petitioner and are now settled questions leaving no substantial federal questions to be answered. (See cases cited above.)

No Independent Review by This Court of the Materials Here Is Required.

No review by this court of the materials involved in the six cases made the basis of this petition is required unless a writ *is granted*. *Jenkins v. Georgia*, supra, *Jacobellis v. Ohio*, 378 U.S. 184. Respondent can not find a case which has held that an automatic review of any case by this court is either assured or a right simply because it involves obscenity. The material here was viewed by the state circuit court, the federal district court magistrate in the first case, the federal district court judge after remand, and the three-judge panel of the Fifth Circuit Court of Appeals of the United States. All deemed the materials to be legally obscene and in the review of the Fifth Circuit petitioner was given the benefit of any doubts as to the applicability of *Miller* and an authoritative construction of the ordinance under which he was convicted. For this court now to again view the material would be undercutting the judgments below unnecessarily.

The prior reversal of numerous cases on a now-abandoned practice of merely citing *Redrup v. N. Y.*, 386 U.S. 767, does not mandate a review of these cases or the material involved. Clearly that practice and the argument it created is not applicable to pending cases on direct appeal at the time of the *Miller* decision, nor the cases thereafter on direct appeal, and also should not now be applied to a collateral attack on final convictions prior to Miller coming to this court via Habeas Corpus proceedings.

CONCLUSION

A Writ of Certiorari in this case should be denied for there are no special and important reasons to grant an additional and unnecessary review of the judgment below which was rendered in accordance with prior decisions of this court and is in harmony with the spirit of those decisions.

Respectfully submitted,

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